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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 565

WALTER WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 158-163) is reported at 208 F. 2d 447.

JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 1953 (R. 163), and a petition for rehearing was denied on January 5, 1954 (R. 180). The petition for a writ of certiorari was filed on February 1, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim P.

QUESTIONS PRESENTED

1. Whether the instructions to the jury on reasonable doubt, to which petitioner did not object in the trial court, constituted reversible error.

2. Whether the indictment for receiving property known to have been stolen from the United States and for conspiring to commit that offense alleged criminal intent.

3. Whether the evidence supports the verdict.

4. Whether the proof shows that the property was stolen rather than embezzled.

5. Whether the trial judge's references to the Navy enlisted men who testified for the prosecution as "the sailor boys," to which no objection was made at the trial, constituted reversible error.

STATUTES AND RULE INVOLVED

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

18 U. S. C. 641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys

or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

Rule 30 of the Federal Rules of Criminal Procedure provides:

* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

STATEMENT

On November 6, 1952, an indictment was returned against the petitioner, Walter Williams, and one Tom Baker, charging in one count that they had conspired with James Boatwright and Roy Tanksley "to unlawfully steal, purloin and knowingly convert to their use and the use of others certain

property of the United States * * * including one (1) SNJ airplane propeller of the value of more than One Hundred Dollars * * * " and "to unlawfully receive, conceal and retain with intent to convert to their own use and gain certain property of the United States of the value of more than One Hundred Dollars * * *" including the SNJ airplane propeller, and had committed overt acts in pursuance of that conspiracy, all in violation of 18 U. S. C. 371; and charging further, in a second count, that the petitioner and his codefendant, Baker, had committed the substantive offense of unlawfully receiving, concealing and retaining with intent to convert to their own use the same propeller in violation of 18 U. S. C. 641 (R. 1-5).

On trial, the Government's case consisted principally of the testimony of the alleged co-conspirators, James Boatwright and Roy Tanksley. Boatwright testified that he was an enlisted man at the Naval Air Station at Pensacola, Florida and that on or about March 7, 1952, he received information from Tanksley, also an enlisted man stationed at the Naval Air Station, that the petitioner, who was in the aircraft parts business near the Naval Station, was interested in buying aircraft parts and equipment (R. 19-21). Boatwright and Tanksley then made two trips to petitioner's place of business to find him, but were unable to do so (R. 21-22). On the second trip they met Tom Baker, the local manager of petitioner's business (R. 22, 80), who told them to leave their phone number, which they did (R. 22). Shortly thereafter, on March 13, 1952,

Boatwright received a phone call at the naval base from a person who identified himself as petitioner and who asked Boatwright to meet him at the San Carlos Hotel in Pensacola (R. 22), a place at which petitioner later testified that he stayed when in Pensacola (R. 114). In a conversation at the hotel in the evening of the same day petitioner explained to Boatwright that he bought and sold aircraft parts and that he dealt in Navy surplus so that if Boatwright would sell him some material there was no way to be caught (R. 23). He gave Boatwright a list of parts that he wanted (R. 23-24) and said he would pay $300 for a propeller (R. 25).[1] Boatwright told petitioner he was an enlisted man at Whiting Field and a storekeeper, and that he would have to work with Tanksley to get a propeller (R. 24-25).

Shortly thereafter Tanksley got a propeller and hid it in the woods near the base. Pursuant to arrangements petitioner and Boatwright had made, Tom Baker, Tanksley, and Boatwright then met at a restaurant and went from there together to the spot where the propeller was hidden (R. 25-26). At the time the propeller was transferred Baker promised Tanksley and Boatwright that he would remove its serial number. Boatwright and Tanksley were paid by Baker, partly from the proceeds of a check payable to Baker, written by peti-

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[1] On cross-examination Boatwright testified that the propeller was not stolen until after the agreement between himself and petitioner that petitioner would give him $300 for a propeller (R. 30).

tioner in the presence of Boatwright and Tanksley, which Baker thereupon cashed (R. 28-29, 43).

Tanksley's testimony substantially corroborated Boatwright's (R. 44-52, 60). As he had actually taken the propeller, he testified more fully to the circumstances. The relevant testimony on this point was as follows (R. 46-47):

> Q. Where did you get that propeller from?
> A. Naval Air Station, Pensacola.
> Q. From what part of the Naval Air Station did you get it?
> A. Building 740—Supply Building.
> Q. Did you have access to that building?
> A. No, I just went in and drawed the parts out of the building.
> Q. When you say you drawed the parts out, you mean on a requisition?
> A. Yes, sir.
> Q. What was your purpose in getting that propeller at that time?
> A. To be used in the squadron that I was working in.
> Q. Well now, when you got that propeller what did you do with it?
> A. I carried it to this wooded area near Milton.
> Q. Why did you carry it to the wooded area?
> A. To leave it to sell to Mr. Williams.
> Q. To leave it to sell to Mr. Williams?
> A. Yes.
> Q. Who did you have any dealings with in connection with that transaction?
> A. Mr. Boatwright.

Q. Now, you say you left it in a wooded area—did you go back to that wooded area?

A. Yes, sir, that night.

Q. Did you yourself carry it to the wooded area?

A. Yes.

Q. In your car or in a navy truck?

A. In a navy truck.

Q. Now, who did you go back with that night?

A. Boatwright and Tom Baker.

Q. Boatwright and Tom Baker?

A. Yes, sir.

Q. Where did you go first?

A. We met in front of a restaurant in Milton, Florida, and then went to the wooded area.

The COURT: Who is "we"—who did you meet there?

A. I met Boatwright and Baker.

The COURT: Boatwright and Baker?

A. Yes, sir.

Q. Then you went to this wooded area?

A. Yes, sir.

Q. Now, how far was that from this restaurant?

A. About a mile.

Q. Now, did you have any conversation with Tom Baker about this property?

A. Well, nothing except for him to destroy the serial number on it.

Q. You asked him to destroy the serial number on it?

A. Yes.

Q. On the propeller?
A. Yes.
Q. What was his answer to that?
A. He said that he would take care of that.

In addition, Tanksley testified that in the presence of Baker and Boatwright he removed an identifying log book from the propeller for the announced purpose of destroying it (R. 48-49).[2]

The defense, which consisted principally of the testimony of Baker and petitioner, was in substance that the two defendants did not know that the propeller, which they admitted purchasing from Boatwright and Tanksley (R. 89-93), had been taken improperly from the Navy (R. 89); that they did not even know that Boatwright and Tanksley were in the Navy, never having seen them in uniform (R. 85-86, 134); and that the delivery of the propeller was part of what defendants thought was a legitimate deal for ten propellers (R. 116-118).

Motions for a directed verdict of acquittal based on the insufficiency of the evidence and the failure of the proof to show a theft rather than an embezzlement of the propeller were made and denied, both at the close of the Government's case (R. 75-77) and at the close of the whole case (R. 143-144).

After instructions to the jury to which no objections were then made (R. 144-151), the jury

[2] The remaining evidence for the Government was largely concerned with identification of the propeller and its recovery from a warehouse of petitioner at New Orleans. No issue now raised relates to any of these matters.

returned a verdict of guilty against petitioner and not guilty against Baker (R. 152-153). Petitioner was thereupon sentenced to two years' imprisonment on the conspiracy count and to pay a fine of $1,000 on the substantive count (R. 156). On appeal, the Court of Appeals unanimously affirmed (R. 163).

ARGUMENT

1. On the question of reasonable doubt, the trial court charged as follows (R. 145):

> Notwithstanding this indictment these defendants, as do defendants in all criminal cases, come into this Court clothed with the presumption of innocence, which presumption of innocence remains and abides with them throughout the trial, unless and until the government has by competent evidence convinced the minds of each individual juror of the guilt of these defendants beyond a reasonable doubt.
>
> A reasonable doubt Members of the Jury means exactly what the term implies. A doubt that would appeal to a reasonable person, a doubt for which you can give yourself a reason —it does not mean an idle, whimsical or fanciful doubt, but a real well founded doubt.

Although petitioner did not object at the time, or on his motion for a new trial, he argues (Pet. 12-20) that, despite the prohibition in Rule 30, F. R. Crim. P., against raising such contentions for the first time on appeal, this portion of the charge should be reviewed as substantial error under Rule 52. We submit that on its merits, and because of its tardy

presentation, the issue does not warrant further review.

a. Contrary to petitioner's contention, the charge did not shift the burden of proof. The reference to reasonable doubt followed an instruction on the presumption of innocence, which emphasized that the Government must prove its case. Only if the Government has made a convincing showing does a problem arise as to whether the jury has any remaining doubts. As to these doubts, all the trial court was saying in substance was that they must not be fanciful. Such an instruction was not erroneous. *Freeman* v. *United States,* 158 F. 2d 891 (C.A. 9), certiorari denied, 331 U.S. 805; *United States* v. *Farina,* 184 F. 2d 18 (C.A. 2), certiorari denied, 340 U.S. 875.

It is true that there are cases which have disapproved instructions to the effect that a reasonable doubt is one for which a reason can be given, on the ground that this makes the juror think the reason must be one which he can state to the other jurors. The supposed vice of this is the restraint imposed by the necessity to test the doubt by the reaction of others. *United States* v. *Farina, supra,* at 21. The restraint is not the same when a juror is merely told that he must satisfy himself that his doubt is not whimsical.

There is no significant conflict in the circuits on this point. The Second and Third Circuits have adopted the view that the reasonable doubt formula used here, although not the most desirable phrasing of the concept, does not justify reversal. *United*

States v. *Farina, supra; Marshall* v. *United States,* 197 Fed. 511, 512 (C.A. 2); *United States* v. *Woods,* 66 F. 2d 262, 265 (C.A. 2); *Murphy* v. *United States,* 33 F. 2d 896 (C.A. 3), certiorari denied, 280 U.S. 584. The Ninth Circuit, which at one time took a different view, *Owens* v. *United States,* 130 Fed. 279, has for some time been in accord with the Second and Third, see, *e.g., Louie Ding* v. *United States,* 246 Fed. 80; *Freeman* v. *United States,* 158 F. 2d 891, 896. Although there are contrary decisions in the Eighth Circuit, *Pettine* v. *Territory of New Mexico,* 201 Fed. 489, and *Ayer* v. *Territory of New Mexico,* 201 Fed. 497, it seems doubtful whether these decisions create a conflict. In the first place, they are cases involving the definition of reasonable doubt as a doubt for which the juror could give a reason, presumably to others. And, in the second place, this supposed conflict has already been pressed on this Court without success at least twice before at widely separated intervals, in cases which, like the present, sustain the charge. *United States* v. *Farina,* 184 F. 2d 18 (C.A. 2), certiorari denied, 340 U.S. 875; *Murphy* v. *United States,* 33 F. 2d 986 (C.A. 3), certiorari denied, 280 U.S. 584; see also, *Freeman* v. *United States,* 158 F. 2d 891, 896 (C.A. 9), certiorari denied, 331 U. S. 805.

b. The error in the instruction, if there was any, is exactly the kind of error as to which Rule 30 precludes objection on appeal where there has been no objection below. The Rule provides:

> * * * No party may assign as error any portion of the charge or omission therefrom

> unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

It obviously contemplates that a defendant must make his objections when there is still time to act upon them and that he may not save them as a basis for obtaining a reversal in an appellate court. The objection here relates to a matter which could easily have been cured if called to the attention of the court. It is at most an inartistic phrasing of an amorphous concept. Hence it is clearly not such substantial error as to justify reversal in the absence of objection.

2. Although petitioner made no motion to dismiss the indictment, he now alleges that the indictment is defective for failure to allege intent, and that the decision below is therefore in conflict with *Morissette* v. *United States,* 342 U.S. 246. However, the offenses charged—conspiracy to steal and knowingly receive stolen property, and receipt of stolen property knowing it to have been stolen—necessarily involve criminal intent by their mere statement. Thus the indictment in the words of the statute necessarily charged criminal intent.

The *Morissette* decision, which, like the instant case, involved 18 U.S.C. 641, far from supporting petitioner's argument, helps to refute it. There, the question was not the sufficiency of the indictment, but the meaning of the statute. The Court held that the words "knowingly convert" as used in 18 U.S.C. 641, which punishes whoever "em-

bezzles, steals, purloins, or knowingly converts" government property, imply criminal intent as much as do the words "embezzle" and "steal." Accordingly, the Court concluded, it should have been left to the jury under proper instructions to decide whether the defendant had in fact acted with the requisite intent. The footnote to which petitioner refers (Pet. 21) merely noted that if the words of the statute did not, "in the light of the common law," state all the elements of the offense, additional allegations would have to be supplied.[3] Here, the allegations in the words of the statute—which, as *Morissette* shows, imply intent—state all the elements that had to be proved.

There was in this case a specific charge requiring the jury to find criminal intent with respect to both offenses. With respect to the conspiracy charge, the trial court stated, *inter alia,* that "A corrupt motive or intent is essential to a criminal conspiracy" (R. 147). And, on the substantive count, it stated, *inter alia,* "In prosecutions for receiving stolen goods where there is reasonable doubt as to the defendant's knowledge of the stolen character of such goods, benefit of such doubt should be given the accused, and a verdict of acquittal rendered * * *" (R. 149). This latter charge obviously deals with more than criminal

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[3] The footnote, No. 30, 342 U. S. at 270, reads: "Had the indictment been limited to a charge in the words of the statute, it would have been defective if, in the light of the common law, the statute itself failed to set forth expressly, fully, and clearly all elements necessary to constitute the offense."

intent, but it states the essential intent clearly enough.

3. Petitioner argues that there was insufficient credible testimony in support of the Government's case. For 14 pages of his petition (22-34), he sets out excerpts from the record and argumentative comment on it designed to show improbabilities in the testimony of the two principal Government witnesses who were admittedly accomplices. The issue of credibility was a matter for the jury, as the court below held; the evidence, summarized in the statement and in the opinion below, fully supports the jury's verdict (R. 160-162).

4. Petitioner contends that, as to count 2, there should have been an acquittal because the proof showed that the propeller was "embezzled," rather than "stolen" as charged in the indictment (Pet. 34-35). The factual basis for this argument is the testimony of Tanksley that he obtained the propeller by requisition, "To be used in the squadron that I was working in" (R. 46).

The record makes clear, however, that Tanksley meant that the *ostensible* purpose of his getting the propeller was for use in his squadron. For immediately after this testimony the colloquy continued as follows:

> Q. Well now, when you got that propeller what did you do with it?
>
> A. I carried it to this wooded area near Milton.
>
> Q. Why did you carry it to the wooded area?

A. To leave it to sell to Mr. Williams [petitioner].

Q. To leave it to sell to Mr. Williams?

A. Yes.

Thus, at the time he got the propeller on requisition, Tanksley was acting only for the purpose of selling it unlawfully to petitioner. The felonious intent preceded the requisition of the propeller (cf. R. 30). This is larceny, not embezzlement. *Tredwell* v. *United States,* 266 Fed. 350, 352-353 (C.A. 4), certiorari denied, 253 U.S. 496; *Murphy* v. *United States,* 206 F. 2d 571 (C.A. 5); *Ackerson* v. *United States,* 185 F. 2d 485, 488-489.

5. Although no such objection was raised at the trial, petitioner complains (Pet. 45-47) that the trial court's reference eight times during its charge to Boatwright and Tanksley, the two principal witnesses for the Government, as "the sailor boys," was prejudicial as reflecting a paternal attitude which would cause the jury to view their testimony sympathetically and uncritically.

Petitioner's failure to object to this aspect of the charge, in accordance with the requirement of Rule 30, is even less excusable than his failure to object to the "reasonable doubt" charge. The error of attitude, if any appeared, would certainly have stood out to counsel on the spot and could certainly have been corrected by a further oral charge. The point is trivial and is plainly an afterthought.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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